Supreme Court, U.S.
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No. 08-986

In The

Supreme Court of the United States

CHARLES M. HILL,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The framers of the United States Constitution sought to prevent the vice of criminal trials by affidavit through enactment of the Sixth Amendment's Confrontation Clause. Yet, "trial by affidavit" is what occurred in this first-degree murder prosecution. Five important State witnesses each claimed that they could not recall the events surrounding the charged offense. The witnesses also testified that they could not recall the particulars of *ex parte,* out-of-court statements to the police and/or grand jury in which they implicated the petitioner. The State introduced the out-of-court statements of the four forgetful witnesses (the fifth witnesses' testimony was ultimately stricken), and substantively used those statements. Petitioner was convicted not on the basis of affirmative testimony about the crime, but rather on the basis of uncross-examined out-of-court statements.

1. Whether there comes a point when witnesses' memory losses about the events forming the crux of a criminal prosecution becomes so pervasive that the physical appearance of the witnesses at trial and their submission to cross-examination on topics other than the crime and the particulars of out-of-court accusations does not satisfy the Confrontation Clause?

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OPINIONS BELOW

The order of the Illinois Supreme Court denying leave to appeal is reported at 156 Ill.2d 562, 638 N.E.2d 1120 (Table), and is reprinted at Appendix ("App.") 55. The opinion of the Illinois Appellate Court is unpublished and reprinted at App. 1.

JURISDICTION

On November 26, 2008, the Illinois Supreme Court entered judgment by denying leave to appeal from an Illinois Appellate Court decision. Petitioner did not seek rehearing. This petition has been filed within 90 days of the Illinois Supreme Court's judgment and is timely. This Honorable Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

The Fourteenth Amendment, § 1, to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

1. Prosecutors in Kane County, Illinois sought and obtained an indictment charging the petitioner with first-degree murder and attempt armed robbery of Janial Osborn. The indictment did not name any other defendants. Petitioner underwent a jury trial in which evidence was heard over the course of four days.

2. Around 12:29 a.m. on July 16, 2003, a taxicab dispatcher received a telephone call from a phone registered to the petitioner's mother. Tr. 759-63, 1406. The caller requested a cab for transport from and to locations in Aurora, Illinois. The dispatcher directed Janial "Nell" Osborn to respond. Tr. 759-63.

After not hearing from Osborn for an extended period, the dispatcher asked another driver to look for him. That driver located Osborn, who was sitting still in his cab with its lights illuminated and doors open. The driver asked the dispatcher to call 911. The dispatcher also called the telephone number that had requested the cab. The person who answered said that he had the wrong number and that they were in bed. Tr. 767-84.

A City of Aurora police officer arrived at the scene, and determined that Osborn was deceased. Osborn had been shot several times about the face and torso. The bullet paths were consistent with gunshots originating from the rear. Tr. 1694.

Latent fingerprints recovered from the cab's interior matched those of Cecil Hubbard. Tr. 1620. Petitioner's fingerprints were not found in the cab's interior.

The police investigation revealed that Hubbard, Darnell Wade, Ryan Joyner-Pool ("Joyner") and the petitioner left in the cab from Shea Peters' house. The cab was supposed to drop off the passengers near an apartment occupied by Wade's brother, Jarriet Rush. Police ultimately recovered the murder weapon from an unknown female acquaintance of Keith Gregory.

The State called Peters, Wade, Joyner, Rush and Gregory as witnesses at trial. Hubbard did not testify, and the defense theorized that he or the others in the cab committed the crime.

Police questioned Joyner on July 16th and applied for judicial permission to record conversations. The State played the recordings at trial. Tr. 1836-50. A police officer and others identified Joyner and/or the petitioner as the speakers in the conversations. The State acknowledged (in closing arguments) that the petitioner did not admit shooting the cab driver. Tr. 2051. During the conversations, Joyner and the petitioner discussed the police investigation and the disposition of the gun. Petitioner counseled

Joyner about speaking on the phone and remaining calm. C. 251-62.

Despite being granted immunity and held in contempt, Joyner refused to testify when initially called as witness at trial. Tr. 1626. The State later recalled him as its last witness. Joyner professed that he did not remember what he told the police following the incident. Joyner also testified that he did not remember contact with the petitioner before and around the night in question because of his drug use. The State then attempted to confront Joyner with prior statements and grand jury testimony. Tr. 1906-16. At that point, defense counsel objected on Sixth Amendment grounds. Tr. 1916-33.

The trial judge agreed that the Sixth Amendment would be violated if Joyner persisted in his testimony. Tr. 1933. Joyner's counsel interjected and promised that Joyner would testify if his memory was refreshed with prior statements. Tr. 1937-44. Thereafter, the State questioned Joyner before the jury. When asked if he recalled contacting the petitioner the day before the murder, Joyner exclaimed, "Lock me up." Tr. 1945. The trial court instructed the jury to disregard Joyner's testimony.[1] Tr. 1952.

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[1] The jury nevertheless requested Joyner's police statement during deliberations. Tr. 2070-71. The trial court determined that Joyner's statement could not be provided because the testimony had been stricken. Tr. 2070-71.

Joyner was not the only State witness who testified at trial that he/she could not recall events surrounding the offense and/or prior statements to the police and/or grand jury.

Peters asserted that she could not recall telling the police that she saw four individuals get into the cab. Tr. 1136. In addition, when confronted with statements that an out-of-breath Hubbard had called her after he had left her home in the cab, Peters averred that she could not recall giving such statements. Tr. 1142. The State introduced Peters' police interview. Tr. 1792.

Wade, a habitual drug user, testified that he could not recall a host of facts about the events in question (purportedly because he was drunk), Tr. 1025-38, including:

- the description and identify of the murder weapon, Tr. 900-02;
- the circumstances surrounding the departure from Peters' home, Tr. 906-07;
- the description of and seating arrangements in the cab, Tr. 910-13;
- whether the petitioner possessed any money prior to entering the cab, Tr. 913-14;
- the identity of the person who awakened him in the cab, Tr. 916;
- where the cab stopped, Tr. 917-18;

- the location of the cab and the identity of the persons near him as he was running and heard gunshots, Tr. 924-28, 931-33;
- whether Joyner reached Rush's home first and whether Hubbard ran with him after exiting the cab, Tr. 935-37;
- the number of shots he heard, Tr. 929-30;
- whether the defendant argued with the cab driver, Tr. 930-31;
- whether the petitioner arrived at Rush's apartment after he did, Tr. 937-39;
- whether the petitioner contributed money for a marijuana purchase after arriving at Rush's apartment, Tr. 940-46, 949-52;
- whether Hubbard answered a telephone call from the cab company while at Rush's apartment, Tr. 944-49;
- whether the petitioner told the others to "shut up" while at Rush's apartment, Tr. 953-55;
- whether the petitioner said that he wanted to get rid of the gun while at Rush's apartment, Tr. 957-63, 965-66;
- whether the petitioner helped him look for the gun in Rush's apartment, Tr. 964-65;

- the circumstances surrounding the later gun sale, including whether the petitioner was present and took most of the sales proceeds, Tr. 967-77; and
- whether he spoke to the petitioner later in the week and whether the petitioner counseled him to tell the police that he did not know the petitioner, Tr. 980-94.

Wade invariably testified that he could not remember giving statements to the police or grand jury about the subjects listed above.[2] See also Tr. 1017, 1070. The State played (for the jury) the tape-recording of the police interview with Wade, Tr. 1762, and introduced the relevant portions of his grand jury testimony. Tr. 1878-93.

Rush, a convicted felon and former drug addict who was 16 years old at the time of the offense, Tr. 1264-67, testified that he was under the influence of marijuana and could not remember details surrounding what occurred in his apartment on the morning of July 16th, Tr. 1244, including:

- the order of the individuals who arrived at his door, Tr. 1217-19;
- whether he went into a room with those individuals, Tr. 1221-24;

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[2] Wade claimed that he was probably under the influence of drugs when he spoke to the police and that officer told him that he could be charged with a weapons offense if things went wrong. Tr. 1060.

- whether the petitioner acted nervous, Tr. 1230-31;
- whether a phone call from the cab company came in on the petitioner's cell phone, Tr. 1238-41;
- whether the petitioner said Rush knew what happened, Tr. 1241;
- whether the petitioner admitted he shot the cab driver, Tr. 1244-49;
- whether the petitioner said he planned to rob the cab driver, Tr. 1250-51;
- whether he asked the petitioner he if could have done something other than shoot the cab driver, Tr. 1251-56;
- whether he continued to speak to the petitioner after Wade and Hubbard went to sleep and the petitioner admitted shooting the cab driver, Tr. 1258-60; and
- whether he asked the petitioner if Joyner or Hubbard knew the petitioner had a gun, Tr. 1259-61.

Like Wade, Rush testified that he could not recall giving statements or testimony about the foregoing subjects. See also Tr. 1273. The State introduced a tape-recording of Rush's police interrogation, Tr. 1811-14, as well as relevant portions of his grand jury testimony. Tr. 1867-76.

Gregory, a convicted felon, testified pursuant to immunity. Tr. 1300, 1322-23. Like Wade and Rush, he

professed that he could not remember the events of July 16th because of drug use. Tr. 1300-04, 1330, 1364. Gregory maintained that he could not recall any of the details surrounding his purchase of a gun from Wade. Tr. 1302-20. When confronted with his tape-recorded police statement on the subject, Gregory testified that he could not recall it. See also Tr. 1298, 1328, 1336-60, 1364. The State played the tape-recording of Gregory's police interview for the jury. Tr. 1751.

In closing arguments, the State relied on the witnesses' grand jury testimony and police statements for substantive purposes. *E.g.*, Tr. 1980, 1989, 1991, 2001. See 725 ILCS 5/115-10.1 (2006) (allowing for substantive use of prior statements provided that the declarant is subject to cross-examination about the statement). The petitioner took the position that the prior statements/testimony were not believable. Tr. 2027.

In a note to the court during deliberations, the jury requested, *inter alia*, copies of Rush's tape-recorded police statement and grand jury testimony; and Wade's grand jury testimony. The court accommodated the jury's request with respect to the grand jury transcripts. The court did not provide the jury with the police interview tape-recordings on grounds they constituted impeachment. The jury's next communiqué with the court was announcement it had

reached a verdict. Tr. 2070-74. The jury found the petitioner guilty of first-degree murder.[3]

4. After being sentenced to 48 years in the penitentiary, the petitioner filed a timely appeal to the Illinois Appellate Court. As pertinent here, the petitioner maintained that the witnesses' memory losses resulted in the denial of his Sixth Amendment right to confrontation. The appellate court found that the petitioner had not made this objection at the trial level, but nevertheless addressed the issue on the merits pursuant to the plain error rule.

The appellate court noted that *Crawford v. Washington*, 541 U.S. 36, 42 (2004), did not "explain it meant for a witness to 'appear' for cross-examination." App. 41. The appellate court, however, found that *Crawford* had not disturbed *Delaware v. Fensterer*, 474 U.S. 15 (1985), or *United States v. Owens*, 484 U.S. 554 (1988), *i.e.*, that the Confrontation Clause is satisfied when the defense is given a full and fair opportunity for cross-examination. The appellate court found that standard to have been satisfied:

> The witnesses in this case recalled bits and pieces of their prior statements and for the most part, stated that they did not recall events because of passage of time. They acknowledged making their statements but

[3] The trial court dismissed the armed robbery and felony murder counts at the close of the State's case.

> failed to recall the details or changed details. These witnesses were present for cross-examination and answered counsel's questions. For each witness, defense counsel properly attacked the witnesses' credibility by illuminating their inability to remember details. While questioning may not have gone the way defense counsel desired, defendant's right to be confronted with witnesses was not violated.

App. 45.

REASONS FOR GRANTING THE PETITION

"[T]rial by affidavit" is the "paradigmatic evil the Confrontation Clause" was aimed to prevent. *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); see also *California v. Green*, 399 U.S. 149, 156 (1970). Over a century ago, this Court explained the Confrontation Clause by stating, "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases . . . " *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). More recently, this Court, after conducting an exhaustive historical analysis, stated:

> [T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices

> that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Crawford v. Washington, 541 U.S. 36, 50 (2004).

In this case, the "evil" of "trial by affidavit" came to fruition. Petitioner was not convicted on the basis of affirmative witness testimony about the offense, for the witnesses testified that they could not recall critical events implicating the petitioner. As a result, the prosecution "confronted" each witness with *ex parte* statements he/she gave to police officers or the grand jury. The witnesses mostly testified that he/she could not recall giving the particular statements.[4] Not only did the prosecution parade the out-of-court statements before the jury, but it played the actual police interview tape-recordings and introduced the pertinent portions of the grand jury transcripts. The trial court instructed the jury that they could use these statements for substantive purposes. In closing arguments, the prosecution relied not on the content of the witnesses' in-court testimony, but rather their out-of-court statements. Those statements had effect on the jury, for they were requested in deliberations.

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[4] The record does not contain any suggestion that the petitioner was in any way responsible for the witnesses' memory lapses.

Shortly after the trial judge gave the jury the grand jury transcripts, the jury found the petitioner guilty.

It is true that Peters, Wade, Rush and Gregory physically "appeared" at trial, but, as noted, each claimed memory loss with respect to critical points in the prosecution's case. The mere appearance of witnesses at trial is not enough to satisfy the Confrontation Clause. As this Court stated in *Davis v. Alaska*, 415 U.S. 308, 315 (1974), "Confrontation means more than being allowed to confront the witness physically." See also *People v. Redd*, 135 Ill.2d 252, 313, 553 N.E.2d 316 (1990) ("'mere fact' that [the witness] was present and sat 'still long enough for questions to be put' to him simply does not substitute for effective cross-examination"); Fed. R. Evid. 804(a)(3) (declarant is "unavailable" when he/she "testifies to a lack of memory of the subject matter of the declarant's statement"). The cross-examination component of the Confrontation Clause requires that an accused be provided "a full and fair opportunity" for probing cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985); see also *United States v. Owens*, 484 U.S. 554, 557 (1988) (Confrontation Clause has "long been read as securing an adequate opportunity to cross-examine adverse witnesses"). The question becomes whether "full and fair opportunity for cross-examination" is provided when prosecution witnesses repeatedly profess memory loss as to critical facts.

Prior cases have addressed the relationship between witness memory loss and the Confrontation Clause. In *Green*, the main witness against the

defendant testified at trial but asserted memory loss as to the facts implicating the defendant, thereby allowing the State to confront the witness with his contrary preliminary hearing testimony. The State also introduced the cross-examined preliminary hearing testimony later in the trial. This Court found the issue of whether the witness' memory lapse "so affected Green's right to cross-examination as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture." 399 U.S. at 168-69.

In *Fensterer*, an expert witness testified about his expert conclusion, but failed to recall the reasons for his opinion. This Court pointed out that the Confrontation Clause 1) protects against convicting the accused with hearsay, and 2) provides the opportunity for meaningful cross-examination. This Court found that the case fell "in neither category," 474 U.S. at 19, as the State had not attempted to introduce any out-of-court statements, and the trial court had not restricted the defendant's cross-examination. Significantly, this Court left the following question open: "*We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause.*" *Id.* at 20 (emphasis added).

This Court next addressed the issue of a forgetful witness in *Owens*. In that case, the brutal attack of a corrections counselor impaired his memory. At the

alleged attacker's trial, the victim affirmatively testified about the circumstances precipitating the attack and recounted that he identified the defendant as the assailant when an FBI agent had visited him in the hospital. With respect to the Confrontation Clause, this Court held that it guarantees only the opportunity for effective cross-examination, and found that "that opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief." *Id.* at 559.

This case is plainly different than *Fensterer* and *Owens*. Unlike *Fensterer*, this case involves the admission of out-of-court statements. (Of course, there was nothing particularly reliable about such statements. See *Lilly v. Virginia*, 527 U.S. 116 (1999) (plurality).) Moreover, in both *Fensterer* and *Owens*, the witnesses affirmatively testified as to their conclusions. The expert witness in *Fensterer* testified as to his opinion, and the victim in *Owens* recounted the circumstances of the attack, as well as his out-of-court identification of the defendant. Here, in contrast, the witnesses did not provide similar testimony; rather, they saturated this record with claims of memory loss regarding the circumstances surrounding the charged offense, as well as the particulars of their accusatory out-of-court statements.

The "opportunity for full and fair cross-examination" standard must have some meaning in application. The principle is not disputed, but statement of the principle is not enough to satisfy the Confrontation Clause. The words "full" and "fair" or

"adequate" must have some meaning. Here, the petitioner was denied the opportunity for "full and fair cross-examination" about the most important topics in the case – the crime itself, the disposition of the murder weapon and the particulars of accusatory *ex parte* statements. Cf. *Redd*, 135 Ill.2d 252, 553 N.E.2d 316; *Commonwealth v. Kirouac*, 405 Mass. 557, 542 N.E.2d 270 (1989). Indeed, by the time the State's last witness (Joyner) appeared and claimed lack of memory, the trial court realized that introduction of the testimony and out-of-court statements would violate the Confrontation Clause. Tr. 1933. There is no principled difference between Joyner and the other four State witnesses (Peters, Wade, Rush and Gregory).

The memory lapses about the underlying out-of-court statements further render this case distinguishable from *Owens*. As stated by one commentator:

> The *Owens* victim-witness did not recall the identity of his assailant at trial, but he did recall making the identification and this circumstance may permit distinction. The opportunity to cross-examine a witness who recalls at least the making of a statement permits inquiry into the circumstances under which the statement was made. Such a witness may testify to circumstances that cast doubt on its veracity. For example, he may, by being able to recall the making of the statement, recall that he was lying or uncertain when he made it. A witness like the one

> in *Owens*, who recalls making an identification from mug shots, may also recall, upon cross-examination, conditions that will permit defense counsel to argue that the procedures used to procure the identification were suggestive. This line of inquiry was open to defense counsel in *Owens*, and in remarking upon the opportunities for cross-examination and confrontation that still exist when a witness pleads forgetfulness, the *Owens* Court was careful to note this one. Lines of inquiry like this – exploration of the witness's recollection of special circumstances that might permit a fuller evaluation of a statement's reliability – are of course blocked when not only the content but the making of the statement are forgotten.

Comment, *The Forgetful Witness*, 60 U.Chi.L.Rev. 167, 179 (1993) (footnotes omitted).

Nor can this case be squared with *Douglas v. Alabama*, 380 U.S. 415 (1965). There, a witness refused to testify. While the witness was on the stand, the prosecution read statements from the witness' police interview implicating the defendant as the shooter in a murder. Later during the trial, the prosecution called police officers who identified the witness' confession. This Court found that the defendant's inability to cross-examine the witness "as to the alleged confession plainly denied him the right of cross-examination." Likewise, in this case, because the witnesses repeatedly refused to give testimony about the charged offense and maintained that they

did not remember making the particular out-of-court statements highlighted by the prosecution, the petitioner was denied meaningful cross-examination.

There comes a point when witnesses' memory losses about the events forming the crux of a criminal prosecution becomes so pervasive that the mere physical appearance of the witnesses at a trial and submission to cross-examination about topics *other than* the charged offense and accusatory out-of-court statements does not satisfy the Confrontation Clause. This Court left open that possibility in *Fensterer*. This case gives this Court the opportunity to address this significant constitutional question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHARLES M. HILL, Defendant-Appellant.	Appeal from the Circuit Court of Kane County. No. 03-CF-1598 Honorable Grant S. Wegner, Judge, Presiding.

RULE 23 ORDER

(Filed Aug. 19, 2008)

Defendant, Charles M. Hill, was found guilty of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2002)) on September 15, 2006, after a jury trial. On January 17, 2007, the trial court sentenced defendant to 48 years' imprisonment. Defendant timely appealed, raising the following issues: (1) his motion to suppress the contents of a taped telephone conversation should have been granted; (2) his motion to quash the search warrant and suppress evidence should have been granted; (3) the trial court abused its discretion in limiting his cross-examination of witness Darnell Wade; (4) his confrontation clause rights were violated when several witnesses had memory loss at trial; (5) his confrontation clause rights were violated when witness Ryan Joyner-Pool

was not subject to cross-examination; (6) prosecutorial remarks in closing rebuttal argument violated his fifth amendment right to remain silent; and (7) the trial court erred in allowing the jury to hear Pool's recorded conversations with defendant because Pool was unavailable for cross-examination. We affirm.

I. BACKGROUND

A. Procedural Background

On July 16, 2003, a cab driver, Janial Osborne, was found shot to death in his cab near the 900 block of Old Indian Trail Road in Aurora. On July 17, 2003, one day after the murder, Detective Martin Sigsworth of the Aurora police department petitioned for authorization to use an eavesdropping device pursuant to section 108A-1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/108A-1) (West 2002)). The petition alleged the following. Aurora police responded to the crime scene and began investigating the murder of Osborne. Through their investigation, police determined that four male black subjects entered the victim's cab at 1246 Dearborn Avenue and that their destination was the 900 block of Old Indian Trail Road. The four men were identified as Cecil Hubbard ("Little Cecil" or "Dodo"), Darnell Wade ("Little D"), Ryan Joyner-Pool, and a black male subject known as Charles or Markus. Shea Peters, a resident of 1246 Dearborn Avenue, stated that the four men were visiting her and had discussed committing a

theft of services from the cab driver because they did not have money.

The petition continued stating that Pool voluntarily went to police with his pastor to relay his knowledge of the crime. Pool stated that the group had "partied" at Peters' house for approximately four hours. He identified Wade and Hubbard through photo arrays but only knew the other subject as Charles, who had a cell phone with the number 630-430-9071. They called a cab using defendant's phone. The cab driver required payment upon arrival and Pool paid him $9. When the cab approached the 900 block of Old Indian Trail Road, he and Wade exited the cab and began walking towards the apartment building. Defendant and Hubbard waited behind and approximately 15 to 20 seconds later, Pool heard two gunshots fired. He and Wade immediately ran up to the third floor, and as they did, Pool heard two or three more gunshots. Hubbard and defendant came running into the apartment 30 to 40 seconds later. Other people were in the apartment but no one talked about what had just happened. Pool called his parents to get a ride home, and he waited inside the building until they arrived.

Pool agreed to assist the police by recording telephone conversations with defendant and the other subjects involved to show that he was not involved in the planning or commission of the crime. He promised that he would attempt to engage them in conversations about the shooting. The closing paragraph of the petition referenced violations of the "Controlled

Substances Act" and not murder. The trial court granted the petition, stating that Pool was a willing participant, that there was reasonable cause to believe that the other parties had committed a felony, and that the conversations to be recorded would relate to the felony.

On July 21, 2003, police obtained a search warrant for the following location:

> "A residence being a two story family residence creme in color with white trim and maroon shutters. The residence has the numerals '212' affixed to the front exterior next to the left hand side of the front door of the building to be searched."

Defendant's cell phone was retrieved from the search of the residence.

On September 3, 2003, after Pool recorded conversations with defendant, defendant was indicted for first-degree murder.

On April 16, 2004, defendant moved to suppress the contents of the recordings that resulted from the eavesdropping authorization. He argued that the information presented did not rise to the level of reasonable cause to warrant use of the eavesdropping device and that the petition did not reference murder but rather the "Controlled Substances Act." On appeal, defendant makes the same arguments. The State argues that the reference to the "Controlled Substances Act" was a scrivener's error and that the facts recited in the petition clearly related to murder.

On July 1, 2004, the trial court heard defendant's motion. Detective Sigsworth testified for the State. He explained that the petition was filed in relation to a murder investigation and that the "Controlled Substances Act" was an error. He did not delete those words from the last time he used the computer file. On August 5, 2004, the trial court denied defendant's motion. It explained that the facts in the petition clearly referenced the murder and that Pool was present at the time of the murder. The fact that Pool did not witness the actual shooting was irrelevant as circumstantial evidence itself may establish probable cause that a crime had been committed. Given the totality of the circumstances outlined in the petition, it was probable that defendant and Pool would discuss the murder. The trial court believed the reference to the "Controlled Substances Act" was nothing more than a scrivener's error. In light of all the details in the petition, there was no question the police were investigating a murder and not a drug offense. Further, the court cited several cases holding that not all technical violations of an eavesdropping petition required suppression. There was also no evidence that the State gained any tactical advantage as a result of the error.

On May 11, 2005, defendant moved to quash the search warrant and suppress evidence obtained from the search of his mother's home. Defendant argued that the warrant insufficiently identified the location because "212" could identify more than one location. Defendant's residence was also not creme colored but

gray and was a single story home, not a two story home. The parties referenced an affidavit and complaint that were attached or presented with the warrant to the judge, and the affidavit included the complete address of 212 Grays Drive, Oswego, Kendall County, Illinois. The affidavit is not a part of the record on appeal. However, it is uncontested that there was an affidavit and that it included the complete address.

On September 1, 2005, the trial court heard defendant's motion. The State argued that the judge that issued the warrant was the same judge that initialed the bottom of the affidavit. The same detective that was the complainant in the affidavit presented it to the judge and executed the search. Cynthia Smith, defendant's mother, testified that her home was not creme colored but rather was light gray and was a single story home. It did, however, have white trim and maroon shutters. The hearing was continued to September 23, 2005, at which time a copy of the search warrant, complaint, and the affidavit were presented to the court. Detective Sigsworth testified that he worked on the affidavit and search warrant and searched the home with his partner, Detective John Thompson. Detective Thompson had signed the complaint and affidavit. Although there was a Grays Court in addition to a Grays Drive in the neighborhood, there was no home numbered 212 on Grays Court. Further, he and his partner were very familiar with the location based on their surveillance and their experience with the area. Photographs

depicted the home and showed that the residence was single story in one area but two story in the front area where the "212" was affixed.

On October 7, 2005, the trial court denied defendant's motion to quash the warrant and suppress evidence. The trial court acknowledged that a warrant was not to be quashed based on hypertechnical violations, that affidavits presented with the warrant could be used to interpret the warrant in a commonsense fashion, and that surveillance could be used to guard against confusion. Based on the photographs, Detective Sigsworth's testimony, and the warrant, affidavit, and complaint, the trial court determined there was no ambiguity or confusion regarding the location to be searched.

On January 13, 2006, defendant moved *in limine* to bar the tape recorded conversations between Pool and defendant, arguing that they were inadmissible hearsay. The trial court denied the motion on March 8, 2006.

B. The Trial

Defendant's trial began on September 11, 2006. Marion Finley testified first for the State. Finley was a dispatcher for Deluxe Cab in Aurora in July 2003. On July 16, 2003, Finley received a telephone call from a male at approximately 12:29 a.m. He recorded the incoming phone number on a telephone log as 630-430-9071. The man requested a pick-up at 1246 Dearborn and a drop-off at 671 Old Indian Trail in

Aurora. Finley dispatched Osborne to the pick up site. When Osborne was near the location, Finley called back 430-9071 and advised the customer that the cab was there, and the man said okay. Osborne then advised Finley that he was en route with the passengers. Finley waited approximately 15 minutes for Osborne to radio back that the trip was complete. When he did not hear back, Finley attempted to contact Osborne several times using a two-way radio. He also called his manager and asked what he should do. Finley called 430-9071 to see if the passengers were still in the cab. The same man answered and said "You have the wrong number, we're in bed." He then asked another driver to trace the route to look for Osborne. Hilda Bello was in the area and agreed to check on Osborne. About five minutes later, Bello radioed back hysterically asking Finley to call 911, which Finley did.

Outside the presence of the jury, the State called Pool. Pool, who had counsel present, exercised his fifth amendment privilege against self-incrimination. The State moved to confer use immunity pursuant to section 106-2.5(b) of the Code (725 ILCS 5/106-2.5(b) (West 2006)) The court granted the motion and advised Pool that if he continued to refuse to testify, he could be held in contempt of court. Pool was advised to return to court the next day to testify. The next day, he refused to answer any questions, and the trial court held him in direct criminal contempt of court. Pool was then taken into custody.

Continuing outside the presence of the jury, the State called Wade to testify so that the State could lay a foundation for various audio recordings. Wade recognized Pool's voice and recognized the name "Whispers" as defendant, but he did not independently recognize defendant's voice on the recordings.

On cross-examination, Wade admitted that he first heard the tapes when he was in jail for other charges, and he told the State that he could not identify any of the voices. He recognized the voices when the State played him the tapes again at his home because he was able to hear the voices again. He denied being promised anything in exchange for recognizing Pool's voice.

The State then had Wade testify in the presence of the jury. In July 2003, Wade knew defendant and also knew him as "Whispers." He knew Hubbard and knew his nicknames of "Dodo" and "Little Cecil." Wade was less acquainted with Pool and saw him off and on when he saw defendant and Hubbard, which was nearly daily. On the night of July 15, 2003, Wade was with defendant and Hubbard at the home of a girl named Shea, located on Dearborn Avenue in Aurora. The group left to purchase beer and cigars and then picked up Pool. They went back to Shea's home and "got drunk and high." Wade had a revolver that night and put it in a dresser drawer at Shea's house. Everyone knew that Wade had the gun and had put it in the drawer. Wade passed out and was awakened by Shea when it was still dark and told to leave. He could not remember the time. Wade called

his brother, Jarriet Rush, that he would be coming over. Rush resided on Old Indian Trail Road in an apartment building. Prior to leaving, Wade went to retrieve his gun but it was not in the drawer. He asked who took it and was told to "be cool" because Wade was intoxicated. Wade did not recall who called the cab but a cab came to pick them up at Shea's house. Wade, Hubbard, Pool, and defendant got into the cab. He sat in the front passenger seat but did not know who was sitting where in the backseat. The driver asked for money up front, and Pool gave the driver $20. Wade did not remember if he or defendant had any money on them. They asked to be dropped off at the Old Indian Trail apartments. Wade slept during the cab ride and was awakened by Hubbard. Wade exited the car and saw everyone else exit also. Wade remembers hearing gunshots and seeing the cab travel in reverse but could not remember the sequence these events happened. He heard three to four gunshots.

After he heard the shots, Wade ran up to his brother's apartment. He saw Hubbard running also and he thought Pool and defendant were there too but could not recall exactly. Once they were inside Rush's apartment, they tried to smoke some marijuana. Wade could not recall who put money in to buy the marijuana. Pool was very upset in the apartment and left shortly thereafter. Wade did not recall if defendant received a phone call while in Rush's apartment. A female arrived with marijuana and Wade did not recall if she said anything when she did. They

smoked marijuana and went to sleep. Everyone was awakened by a friend of Rush's who had knocked on the door. Wade saw that there were news media near where the cab had been. Wade decided to sell his gun because he was leaving town and did not want it. He sold the gun to Keith Gregory and Wade kept the money. Wade's friend, Tamara, picked him up after Gregory left with the gun. Wade then left that day or the next day on a Greyhound bus to visit his mother in Wisconsin.

Wade denied shooting the victim or having anything to do with the murder. He did not come to police after the shooting because he did not want to get involved. He had no contact with Pool after that day. At the time of trial, he had a prior conviction in Cook County for attempted armed robbery and possession of a stolen motor vehicle in Kane County, and he was on parole for another possession of a stolen motor vehicle in Kane County. He was sentenced to the Department of Corrections for two offenses and received probation for the earlier Kane County violation. He denied that he had a deal on his recent conviction in exchange for his testimony at defendant's trial.

Wade recalled giving police a taped statement on July 26, 2003, and testifying before a grand jury on August 5, 2003, but he did not recall giving a very different account of that night in those statements. Before the grand jury, Wade said he was awakened around 11:30 or 11:40 p.m. When the cab picked them up, he sat in the front passenger seat, defendant sat

directly behind him, Pool was in the middle, and Hubbard was behind the driver. Wade had only two or three dollars on him, and defendant was "broke." After Wade left the cab, defendant stayed in the cab and "had words" with the driver. He heard shots fired after the reversing cab came to a stop. He heard four to six gunshots. Wade ran to his brother's apartment entrance area. Once all four men were downstairs, they went up to the apartment. Defendant arrived at the apartment after Wade.

Once inside Rush's apartment, people talked about hearing gunshots, and defendant said for them to "shut up, just be quiet, shut up, quit talking about it." Defendant then threw money in for marijuana though he previously was "broke." Defendant's cell phone rang, Hubbard answered it and disguised his voice. The caller identification revealed that it was the cab company calling. When the female arrived with marijuana, she and Rush said that there was a cab parked down the street with its headlight on. Rush asked defendant what happened, and defendant said to shut up about it.

After Rush's friend woke the men up, defendant said that they had to get rid of the "strap," meaning the gun. Wade was not sure where the gun was but defendant told him it was in Wade's father's bedroom. Defendant retrieved the gun, and when Wade sold it, defendant kept most of the money. Wade received a phone call from defendant while staying in Wisconsin. Defendant indicated that he had hired a lawyer and that Pool was cooperating with police. Defendant told

Wade that they should all say that they do not know each other. Defendant told Wade that Pool was talking to the police and that he (defendant) should "whack [Pool's] ass" since he "already did it." Wade denied these statements at trial.

On cross-examination, defense counsel attempted to question Wade further about whether or not he believed the State would go easy on him if he were to testify. The State objected, arguing that Wade's initial grand jury testimony and police statements were given before the new crimes were committed so he could not have had an incentive at that time to testify for the State. Defense counsel responded that he still could have believed during the interim that the State could arrange for favorable resolutions of his cases. The trial court sustained the objection. Later, when asked whether he feared being charged with a crime when testifying before the grand jury, Wade stated, "Not that day. They said it was going to come around, though, if things go wrong that I can be charged with it and stuff like that." "They" meant the officers that picked him up in Wisconsin and brought him to the grand jury under subpoena order. Those officers told Wade's mother this, and his mother told him. The State objected to this statement as hearsay because Wade was not present when the officers allegedly made the comment. The trial court sustained the objection. Still, Wade testified that the thought of getting charged "probably came across [his] head," but he was not certain.

Wade admitted that he did not see the murder and did not know who had his gun or who killed the driver. He did not know what role Hubbard played in the shooting. He admitted that he felt he had to get rid of the gun before leaving Rush's house because there already was a warrant out for his arrest and his gun potentially was just used in a crime. He denied telling police in a prior statement that it was defendant's idea to get rid of the gun. He admitted that he was never charged for possessing or selling the gun or for being an accessory to the murder.

Outside the presence of the jury, the State questioned Shea Peters to lay the foundation for the audio tapes. Peters knew defendant for about one year prior to July 15, 2003. Peters identified defendant's voice on the tapes and transcripts.

With the jury present, Peters testified as follows. On July 15, 2003, she lived at 1246 Dearborn Avenue in Aurora. She knew defendant by name and by his nickname "Whispers." She spent time with him, spoke to him on the phone; and considered him a friend. She returned from St. Louis on July 15 and called defendant, anxious to see him. He arrived at her home with Wade, Pool, and Hubbard. Peters' mother and sister were also home. Wade had a gun and she told him to put the gun in the garage because she did not want it in her house. She saw him put the gun in a dumpster. Defendant, Wade, Hubbard, and Pool left her home around midnight in a cab. Wade called for a cab with his phone. She did not recall any of the group's conversations prior to leaving and did

not see them leave in the cab. She recalled giving a statement to Detective Sigsworth on July 16, 2003, but she did not recall what she told him. She told the detective that she heard defendant tell Wade that they "should just jump out then." She did not recall stating that she saw them all leave in the cab. After they left, she received a phone call from Hubbard and said he sounded "normal." She did not recall telling the detective that he sounded very out of breath.

Next, Peters was allowed to review transcripts of the taped conversations between defendant and Pool. She identified defendant's voice as she did during the questioning done outside the presence of the jury.

Jarriet Rush testified for the State as follows. In July 2003, Rush resided in a third-floor apartment at 971 Old Indian Trail in Aurora. He lived there with his father, aunt, and younger brother. Wade is his older brother. Rush knew defendant and knew him as "Whispers." He also had known Pool and Hubbard for many years. On the night of July 15, 2003, Wade called Rush on his phone and asked if he could come over and spend the night. Later, Wade called again and asked him to come downstairs and open the door. He went downstairs and waited for them to arrive. The four men were running towards the door. Wade was the first man he saw but he could not remember the order that the rest arrived. They were breathing heavy from running. They went up to the apartment and they tried to smoke marijuana. Pool called for someone to pick him up and asked Rush and Hubbard

to wait with him downstairs. They did so and then went back upstairs and began smoking marijuana.

Rush recalled giving a taped statement to police on July 23, 2003, and testifying before the grand jury on July 29, 2003. In those statements, Rush gave a different account of what happened. While waiting for Wade in the entrance of the apartment building, he saw Wade first, then Hubbard, then defendant, and then Pool. Once inside Rush's apartment, defendant paced back and forth and appeared nervous. While waiting with Pool for his ride, Rush saw the cab down the street with its headlights on. After going back upstairs after Pool left, defendant received a phone call, looked at his caller identification, and saw that it was the cab company calling. He gave Hubbard the phone. Defendant told Rush that Wade and Hubbard jumped out while the cab was still moving. The cab driver then kept driving, and defendant told him to stop and let him out. The cab driver refused, and defendant pulled out the gun. Defendant shot the cab driver in the neck and then the car started to swerve and hit a bump in the road. Defendant told him he hit his head on the ceiling and then leaned to the front of the cab and shot the driver four more times in the chest. He asked defendant if he took any money from the driver, and defendant answered that he did not because he did not intend to rob the driver but only wanted a free ride. Rush told defendant that he did not have to shoot the man and could have "pistol-whipped" him. Defendant replied that he could have but he was scared. He asked defendant point-blank

why he shot the cab driver. Defendant answered "'cause he wouldn't let him out of the cab."

While in Rush's bedroom, Wade fell asleep first and then Hubbard. While Rush and defendant were still awake, Rush asked defendant if anyone else was there in the cab when he shot the driver and defendant responded that Pool was in the car. Pool sat there and said "you shot him." Rush asked defendant if Pool knew he had a gun, and defendant responded that Pool did not know anything. Defendant also said that Hubbard and Wade knew he had the gun but did not know that defendant was going to shoot the driver with it.

On cross-examination, Rush admitted that he had a conviction for selling drugs from May 4, 2005. He stopped using drugs after being released from jail, but prior to 2005, he regularly used marijuana. He admitted he smoked marijuana on July 15, 2003, but denied that he was "high" when the defendant arrived. He admitted that he never wanted to talk to the State's Attorney or police investigators but did so at the command of his father and basketball coach, who also was a police officer. He denied that what he told them and the grand jury was untrue but he testified that he now did not remember all the conversations. He did not know Wade had a gun and did not see the gun in the apartment. He did not recall defendant confessing to the murder but denied that such a confession would be an important thing to remember. He was not involved so the murder was not something he cared about.

On re-direct, Rush denied that his father told him to lie to the police. When he first gave a statement to the police, Rush thought that it was under the condition he would not have to testify in court.

Keith Gregory testified next for the State. Gregory's attorney was present during his testimony, and he was currently in custody for drug charges in Kane County. He did not recall signing an immunity agreement with the State's Attorney for his cooperation with this murder investigation. He recalled giving a taped statement to police on July 30, 2003, but he did not remember what he told police. He currently had no recollection of what happened on July 16, 2003. In his prior statement, however, he said that Wade called him between 8 and 10 a.m. on July 16, and that he went to meet Wade at Rush's apartment to buy a gun from Wade. He paid Wade $90 for the gun, which he gave to a female acquaintance to hold for him until he sold the gun to another party.

Gregory admitted that he had two prior drug convictions in 2001, two drug convictions in 2002, and the current pending drug charge. He denied that he was promised anything in exchange for his testimony other than immunity for the sale of Wade's gun.

Tamara Damery testified outside the presence of the jury. Damery was a friend of Wade, Hubbard, and defendant. She knew defendant as "Whispers," and saw him daily for about six months prior to July 16, 2003. The State played the taped conversations and

showed her the transcripts between Pool and defendant. Damery identified defendant's voice on the tapes. Damery admitted that she was out on bond for one count of forgery and one count of burglary, and that she smoked marijuana daily.

In the presence of the jury, Damery testified as follows. She was Wade's girlfriend in July 2003. She received a call from Wade in the early morning hours of July 16 from defendant's phone and again the next morning. The next morning she went to pick up Wade from his grandmother's house in Aurora and took him to the Greyhound station. Wade stated that he had gotten into some trouble and needed to get out of town right away. He had Damery drive by the area where the crime occurred. Damery observed the yellow caution tape and that Wade looked sick to his stomach. She recalled having a conversation with defendant in which he said the cab driver wanted drugs and then started acting crazy as if he would hit a tree. She recalled giving a statement to Detective Sigsworth in July 2003. After reviewing that statement, she remembered that defendant said the cab driver "got shot." She admitted that defendant did not specifically say that he shot the driver. She recalled being with defendant at some point after July 16 when he received a phone call. She heard defendant say that he did not want to be on the phone for more than two minutes in case the phones were tapped. Damery identified defendant's voice using the transcripts.

Dan Jensen testified for the State as custodian of records for Sprint Nextel. He confirmed that telephone records supported the witnesses' original statements to police and the grand jury. Evidence technician Scott Carter, forensic scientist Francis Senese, forensic pathologist Dr. Bryan Mitchell, and forensic scientist Patricia Wallace all testified regarding physical evidence, which supported that the bullets came from Wade's gun, that the path of the bullets came from the passenger side back seat where defendant allegedly sat, and that fingerprints supported the seat positions that Wade originally described to police.

Detective John Thompson with the Aurora Police Department testified next for the State. Detective Thompson was dispatched to the scene as lead investigator. After getting a synopsis at the scene, he went to Deluxe Cab to speak with Finley. He later obtained and executed a search warrant for 212 Grays Drive in Aurora, which he knew belonged to defendant's mother. He interviewed Wade on July 26, 2003, in Wisconsin, and that conversation was recorded. The recording was played for the jury and it was given the transcript to assist them. Wade never stated that he could not remember anything that happened that night, nor did he say that he was too drunk or too high to remember anything on that night. Wade stated he sold the gun to Gregory so Detective Thompson obtained a search warrant for Gregory's residence. While there, Gregory directed the police to a black female in Bolingbrook, from whom police

retrieved the gun. After Gregory was granted immunity, Detective Thompson interviewed him with an assistant state's attorney present. The interview was recorded, and the tape was played for the jury with the transcript provided to assist.

On cross-examination, Detective Thompson admitted that Wade's gun was stolen and that possession of a stolen firearm was a felony offense. He admitted that Wade was not charged with that offense. He also was not charged with selling the firearm. On re-direct, Detective Thompson explained that the decision not to charge Wade was a conscious one and that he felt that the murder investigation was more important than charging Wade and risking his lack of cooperation. However, Wade was not promised any deals for his cooperation and was not specifically told that he would not be charged.

Detective Sigsworth testified next for the State. After responding to the scene, he interviewed Peters. She agreed to be interviewed and the interview was tape recorded. The recording and transcript were admitted into evidence and played for the jury. He also interviewed Rush with another sergeant and Rush's father present. Rush agreed to be interviewed and never stated that he was under the influence of any drugs. He did not appear to be under the influence of any type of drug either. Rush never indicated that he could not remember what occurred on July 16, 2003. He had a clear memory of that day when he spoke to Detective Sigsworth. He taped his interview with Rush. That tape was played for the jury, and

they were given the transcript of the conversation to assist.

On the evening of July 16, 2003, Pool went to Detective Sigsworth, and he interviewed him. Pool agreed to tape conversations with defendant about the crime. Detective Sigsworth applied for the use of an eavesdropping device, and Pool recorded several conversations with defendant. He was present when Pool made the calls, but he could not attest to the voice on the other end of the calls. Using the transcript marked exhibit 17A, which was a call between Pool and defendant on July 17, 2003, Detective Sigsworth verified Pool's voice and the accuracy of Pool's part of the conversation. The tape was again played for the jury, and they were given the transcript to assist. This sequence of events occurred again for all calls made, which were marked as exhibits 19 and 19A, 20 and 20A, 24 and 24A, 25 and 25A, and 26 and 26A.

Detective Sigsworth interviewed Wade in Wisconsin. Wade never stated that he could not remember details of July 16, 2003, and did not state that he was too high or drunk to remember. At the time of the interview, he did not appear to be high or drunk.

The State finally called Pool to testify as he had a change of heart while in jail for contempt of court. Pool acknowledged that he knew defendant in July 2003. He did not recall whether defendant was known by any nicknames. He identified defendant in court. He did not remember having contact with defendant

on July 15, 2003 around 8 p.m. He remembered speaking with Aurora police on the evening of July 16, 2003, but could not recall what he said. The transcripts would not refresh his memory because he was on heavy drugs that day. He did not recall telling Detective Sigsworth that he called defendant on July 15 and that defendant's phone number was 630-430-9071. He did not remember whether he was on drugs when he spoke to police on July 16 or on July 18. He did not recall that he met defendant at a gas station and jumped in a car with defendant and some girls. He "vaguely" remembered hanging out with defendant in July 2003. At this point, defense counsel objected, stating she could not confront a witness with such memory loss. The trial court agreed because Pool was avoiding answering all questions, including those about the crime *and* about mundane detail. Then, it advised the jury that his testimony was to be disregarded and stricken. After discussing the issue with Pool's attorney, the trial court decided to allow Pool to review the transcript once more and attempt to refresh his recollection. Pool agreed to testify again. Once on the stand, the State asked again whether he recalled contacting defendant on July 15, 2003. Pool replied "Lock me up." The jury was immediately taken out of the courtroom. Once Pool was taken into custody, the jury was brought back and told to disregard the testimony of Pool as it was stricken. The State and defendant then rested their cases.

The State made the following comments in its rebuttal closing arguments, referencing the conversations between defendant and Pool:

> "Words from the Defendant's mouth. Listen, go back. Listen to what he says. Listen to what he says. Listen to who he eliminates. Because he eliminates Ryan Joyner-[Pool] as well. He doesn't say, when he gets called, I didn't do this. He doesn't say stop talking like that, I didn't do it, talk to Dodo, talk to Cecil, why are you bothering me with this.
>
> Use your common sense. If somebody was going to call you and accuse you of murder, if somebody is calling you, accusing you of committing a crime like this –
>
> [Objection to State misstating the evidence in the overhears. Objection sustained.]
>
> As its [*sic*] relates to the overhear, use your common sense when you listen to it, because what you don't hear – what you do hear from the Defendant is suspicion. I don't want to be on this phone for longer than two minutes, don't be talking like that over the phone.
>
> Why isn't there ever that one admission? Why isn't there any admission, I shot him, I killed him? Because he knows.
>
> He also says when he calls Darnell Wade on July 22nd, he knows that Ryan is tricking on him, Ryan is talking to the police."

During jury deliberations, the jury sent a note to the judge requesting tapes of Rush's police interview and grand jury testimony, Wade's grand jury testimony, and Pool's taped interview. The trial court sent back the relevant transcript portions of the interviews of Wade and Rush but instructed the jury that they were to disregard the testimony of Pool. Later, the jury returned with its guilty verdict.

Defendant filed his motion for a new trial on October 4, 2006, which was denied. On January 17, 2007, defendant was sentenced to 48 years' imprisonment.

II. ANALYSIS

A. Motion to Suppress Contents of Recordings

When reviewing the trial court's ruling on a motion to suppress, we apply a two-part standard of review. *People v. Harris,* 228 Ill. 2d 222, 230 (2008). Under the first prong, a trial court's findings of fact are reviewed under the manifest weight of the evidence standard, giving deference to any inferences determined by the finder of fact. *Harris,* 228 Ill. 2d at 230. Under the second prong, we review *de novo* the trial court's ultimate ruling as to whether the suppression was warranted, meaning we may apply the facts to the issue and draw our own conclusions. *Harris,* 228 Ill. 2d at 230.

Here, defendant's motion to suppress concerns the sufficiency of the State's application to use an

eavesdropping device pursuant to section 108A-1 of the Code. Section 108A-1 provides that the trial court may issue an order "authorizing or approving the use of an eavesdropping device by a law enforcement officer or agency * * * where any one party to a conversation to be monitored * * * has consented to such monitoring." 725 ILCS 5/108A-1 (West 2002). Section 108A-3 delineates what information must be contained in the petition, including the identity of the officer or State's Attorney making the application, a statement of facts relating to the felony, type of communication sought to be recorded, identity of the parties to be recorded, and the period of time for the device to be used. 725 ILCS 5/108A-3 (West 2002). Section 108A-4 provides that a judge may authorize use of an eavesdropping device where it is found that: (1) one party to the conversation has consented to the use of the device; (2) there is reasonable cause to believe that an individual is committing, has committed, or is about to commit a felony under Illinois law; and (3) there is reasonable cause to believe that particular conversations concerning that felony offense will be obtained through the use of the device. 725 ILCS 5/108A-4 (West 2002). Defendant contends that: (1) the State's petition was insufficient because it referenced a drug felony and not murder, and (2) it failed to indicate that conversations concerning the murder would likely occur and thus, was speculative.

First, a petition for use of an eavesdropping device should be viewed in a commonsense fashion. *People v. White,* 209 Ill. App. 3d 844, 877 (1991). The

trial court determined that the reference to the Controlled Substances Act was a typographical error. When read in its entirety, the petition clearly involved a murder investigation and not the Controlled Substances Act. Further, Detective Sigsworth testified that he simply failed to delete and change the "Controlled Substances Act" words in the concluding paragraph to "first degree murder" since the last time he used the form on his computer. The trial court's finding is not against the manifest weight of the evidence and all technical violations of the statute do not require suppression. *People v. Stewart,* 343 Ill. App. 3d 963, 976 (2003). "Where the purpose and reasoning behind judicial authorization were satisfied and the State gained no tactical advantage, any technical defect in the State's compliance with the statutory requirements does not require suppression." *Stewart,* 343 Ill. App. 3d at 976. Here, defendant fails to establish that the State gained any tactical advantage by mistakenly including the words "Controlled Substances Act," and we see none, especially since the facts in the petition all related to the cab driver murder.

Defendant relies on *People v. Bockman,* 328 Ill. App. 3d 384 (2002), for support that a technical defect mandates suppression. However, the petition in *Bockman* that was suppressed due to a technical defect was a petition for an extension. The extension petition lacked details setting forth the results so far obtained or the failure to obtain intended results

as specifically required by section 108A-3(a)(5). *Bockman,* 328 Ill. App. 3d at 388. The complete failure to meet a statutory requirement is not present in this case; therefore, *Bockman* is not applicable.

Next, the trial court determined that the three requirements of section 108A-4 were met. First, Pool consented to the use of the device. Second, there was reasonable cause to believe that defendant had murdered or was involved with the murder of Osborne. The petition provided that the last pick-up Osborne made was of defendant, Wade, Pool, and Hubbard. Pool told police that defendant and Hubbard waited behind in the cab, and he heard shots fired approximately 30 seconds later. Pool told police that defendant and Hubbard came running into the apartment afterward. Finally, Pool stated that he knew defendant and his cell phone number and agreed to assist police by recording and engaging defendant in conversations about the shooting. The trial court's factual determination that there was reasonable cause to believe that Pool would engage defendant in conversations regarding the murder was not against the manifest weight of the evidence.

Using the trial court's factual findings, we agree that a suppression was not warranted. As discussed, the technical violation in which the State inadvertently referenced the "Controlled Substances Act" did not require suppression and sufficient facts were recited that substantiated reasonable cause to believe that Pool would engage in conversations with defendant about the crime. Defendant merely states in his

brief that "[t]here is no allegation in this five-page petition stating that prior phone calls have been made, nor is it alleged that Ryan Joyner-Pool had discussed the facts and circumstances of this crime with any of the co-defendants." We see no requirement that *prior* phone calls had to have been made. Defendant cites to *Bockman* in support. Again, we do not find *Bockman* applicable. In *Bockman,* the initial petition was determined to be insufficient to establish reasonable cause that conversations concerning the felony would be obtained. *Bockman,* 328 Ill. App. 3d at 389. The *Bockman* petition contained only a statement that the consenting party told police that he committed a burglary with defendant a week earlier. *Bockman,* 328 Ill. App. 3d at 385-86. No details were given as to the consenting party's observations or intentions to engage the defendant in any conversations regarding the felony. *Bockman,* 328 Ill. App. 3d at 386. Here, the State's petition contained sufficient facts. Pool knew defendant from school, had been with him on the night of the crime, gave police details about the crime, had defendant's phone number, and agreed to engage him in taped conversations about the crime. Therefore, we find that the petition was sufficient and suppression was properly denied.

B. Motion to Quash Search Warrant and Suppress Evidence

Next, defendant argues that the trial court should have granted his motion to quash the search warrant and suppress evidence obtained from his

mother's home at 212 Grays Drive in Oswego because the warrant lacked specificity. The warrant described the property to be searched as a "residence being a two story family residence creme in color with white trim and maroon shutters. The residence has the numerals '212' affixed to the front exterior next to the left hand side of the front door of the building to be searched." An affidavit attached to the warrant, signed by Detective Thompson who executed the warrant, contained the full address. The State argues that when the warrant and affidavit are read together, there is no confusion or possibility that the warrant would be executed at the wrong location.

The purpose of the requirement that descriptions in search warrants be particular is to prevent the use of general warrants, which would give the police too broad of discretion. *People v. Fragoso,* 68 Ill. App. 3d 428, 432 (1979). A warrant is sufficiently descriptive of a premises if it enables the police, with reasonable effort, to identify the location intended to be searched. *Fragoso,* 68 III. App. 3d at 432. Errors or omissions in addresses are not *per se* fatal to the validity of a warrant as courts may look to other information available to the officer executing the warrant. *Fragoso,* 68 Ill. App. 3d at 432. Reference to an affidavit when determining the validity of a search warrant is permissible "where the affidavit is attached to the warrant, incorporated by reference, or * * * where the officer who signed and swore to the affidavit also executed the search warrant." *Fragoso,* 68 Ill. App. 3d at 428. In *Fragoso,* the warrant contained the address

"3445 West Diversey" but did not contain any city or state. *Fragoso,* 68 Ill. App. 3d at 435. Nevertheless, several other facts all related to areas in Chicago and the officers applying were Chicago police officers. *Fragoso,* 68 Ill. App. 3d at 435. Thus, the court determined that the warrant was valid because there was no confusion that the location was in Chicago. *Fragoso,* 68 Ill. App. 3d at 435.

Here, the affidavit did contain the entire address and was signed by an executing police officer. Detective Thompson swore to the affidavit before Judge Weir, who also initialed the document and signed the search warrant. Defendant acknowledged the existence of this affidavit in his motion to suppress but alleged that there was no evidence that it was presented to the issuing judge. The trial court disagreed, noting Judge Weir's initials on the affidavit and signature on the warrant. Further, Detective Sigsworth testified that he was with Detective Thompson when the warrant was executed. The officers were familiar with the area and had performed surveillance on the home. No other 212 Grays location existed on either Grays Drive or Grays Court, and the warrant gave an accurate description of the home. There was no confusion, given the affidavit, warrant, and testimony, about the location to be searched. Although evidence of severe carelessness, the failure of the warrant to list the entire address was not a fatal defect given the overall facts of this case.

Defendant argues that *People v. Mabry,* 304 Ill. App. 3d 61 (1999), is controlling. We disagree. In *Mabry,* neither the warrant nor any document apart from the warrant contained any part of an address, and the State did not seek to incorporate outside documents to establish an exact location to be searched. *Mabry,* 304 Ill. App. 3d at 66-67. Further, the warrant did not express whether it authorized a search of a residence or a person or both. *Mabry,* 304 Ill. App. 3d at 66. The case here is distinguishable as: (1) there is an exact location provided in the affidavit, (2) Detective Sigsworth's testimony established that he and Detective Thompson had performed surveillance and were familiar with the area, (3) no other 212 Grays Court or Drive existed, and (4) the warrant clearly was meant for a home. Therefore, the trial court's factual findings were not against the manifest weight of the evidence, and its ultimate conclusion to deny defendant's motion to quash the search warrant and suppress evidence was correct.

C. Limitation on Cross-Examination of Wade

Defendant claims that the trial court improperly limited his counsel's ability to cross-examine Wade as to whether he believed that he had any deals with the State in exchange for his testimony. On direct examination, Wade explained that he did not have any deal to testify for the State. In 2004, he was charged with possessing a stolen motor vehicle. Later, he was charged with attempted armed robbery. On those convictions, he received jail time. He received probation

for another possession of a stolen vehicle conviction. The probation in that case terminated. The newer offenses occurred after the 2003 murder and his grand jury testimony. On cross-examination, defense counsel attempted to delve into Wade's convictions when the State objected. The trial court sustained the objection. Defense counsel argued:

> "This doesn't go to impeaching him by conviction. It goes to his motive to testify, Judge, because there was – he got a probation Class 2 terminated, apparently, with no sentence to the Department of Corrections. Then he's on bond for that, he picks up an armed robbery which is then reduced. I think I'm entitled to ask him if in his mind he was getting anything for testifying in exchange for this case.
>
> * * *
>
> I want to ask him if, during the three years that this case has been pending, if in his mind any of his cases have been resolved favorably because it was anticipated he was going to testify for the State."

Defendant also raises the following ruling by the trial court:

> "Q: In August of 2003 when you went in front of the Grand Jury, weren't you afraid of being charged with either illegally possessing that gun that night or illegally selling that gun?

A: Not that day. They said it was going to come around, though, if things go wrong that I can be charged with it and stuff like that.

Q: Who said that?

A: Whoever came to me and my mom's house.

Q: The police officers that came and transported you down here?

A: The detectives, whoever they were, told me that. Really, they told my mom that.

Q: They told your mom that?

A: Yes.

Q: That if things – "

[The State objected based on hearsay. Objection sustained.]

After the objection was sustained, questioning continued as follows:

"Q: So when you appeared in front of the Grand Jury in (*sic*) August 5th of 2003, in your mind you didn't believe that you were going to get charged with anything having to do with the weapon, correct?

A: Yeah. It probably came across my head. I'm not for certain. I don't know that I was thinking. It probably came across my head.

Q: And you didn't need that kind of trouble, did you?

A: No."

Defendant alleges that because his counsel's cross-examination was limited, he was unable to raise the issue that Wade had the understanding that the outcome of his other charges would be favorable if he cooperated and testified at this trial, whether or not there actually was a written agreement. The State argues that Wade had already given his statements to the police and the grand jury before the new charges were brought up, and there is nothing in the record to suggest that Wade testified in order to obtain favorable outcomes in the newer crimes.

Defendants have a right to confront witnesses against them, including cross-examining them for the purpose of showing any interest, bias, prejudice, or motive to falsely testify, under both the state and federal constitutions (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8). *People v. Monroe,* 366 Ill. App. 3d 1080, 1095-96 (2006). The right to cross-examine is satisfied when counsel is permitted to expose the jury to the facts from which it may appropriately draw inferences relating to the reliability of the witness. *Monroe,* 366 Ill. App. 3d at 1095-96. After the trial court has permitted sufficient cross-examination to satisfy the confrontation clause, it may use its discretionary authority to restrict the scope of cross-examination. *Monroe,* 366 Ill. App. 3d at 1096. Limitation of a defendant's right to cross-examination

of the bias or motive of a witness may violate his constitutional right to confrontation. *Monroe,* 366 Ill. App. 3d at 1096. "The test is whether the limitation on cross-examination created a substantial danger of prejudice by denying the defendant his right to test the truth of the testimony." *Monroe,* 366 Ill. App. 3d at 1096.

We look not to what a defendant was forbidden to do but what he has been allowed to do, and if the record shows that the jury was made aware of adequate factors concerning relevant areas of impeachment, reversal will not be granted merely because the defendant was forbidden to cross-examine in another area. *Monroe,* 366 Ill. App. 3d at 1096. If error is found, it does not require reversal where it is shown to be harmless beyond a reasonable doubt. *People v. Prevo,* 302 Ill. App. 3d 1038, 1048 (1999). Thus, we first review whether the defendant's constitutional guaranty has been satisfied, then we review whether the trial court abused its discretion in limiting or restricting the scope of cross-examination. *Prevo,* 302 Ill. App. 3d at 1048. A trial court properly applies its discretion when it limits or precludes repetitive or unduly harassing testimony, or excludes evidence of bias that is too remote or uncertain or nonrelevant evidence that would serve only to confuse or mislead the jury. *Prevo,* 302 Ill. App. 3d at 1048.

In this case, defendant's constitutional right to confront Wade was sufficiently satisfied as to the fact he was not charged with any crime relating to the cab

driver murder or the murder weapon. As to the limitation of counsel's cross-examination of Wade on the crimes he committed while this case was pending trial, we find the trial court erred but that error was harmless. First, defense counsel was allowed to ask Wade whether he was concerned that he would be charged with illegally possessing or selling the gun and whether he was in fact charged. Wade answered both questions, stating that he thought that he could be charged and that he was not charged. He was also asked whether he had any deals with the State, which he stated that he did not. While the court sustained further questions regarding what officers may have told his mother, Wade's answer that he understood that he could still be charged "if things went wrong" was still in evidence. He also testified after the objection was sustained that when he testified before the grand jury he did not believe that he was going to be charged for anything having to do with the weapon. Further, Detective Thompson admitted that Wade was not charged with that offense. He also was not charged with selling the firearm. He explained that the decision not to charge Wade was a conscious one and that he felt that the murder investigation was more important than charging Wade and risking his lack of cooperation. However, Wade was not promised any deals for his cooperation and was not specifically told that he would not be charged. Therefore, the possible motive for Wade to testify in order to avoid charges relating to the handgun was properly raised before the jury.

The trial court's limitation on defense counsel's ability to delve into Wade's newer convictions did constitute an abuse of discretion, but we find that error to be harmless. As stated, the right to cross-examine is satisfied when counsel is permitted to expose the jury to the facts from which it may appropriately draw inferences relating to the reliability of the witness (*Monroe,* 366 Ill. App. 3d at 1095-96), and had the jury been exposed to the outcomes of Wade's interim convictions, it may have concluded that his testimony was influenced by a deal with the State. However, reversal is not granted where an error is harmless. *Prevo,* 302 Ill. App. 3d at 1047-48. Factors to be considered by the reviewing court in determining whether an error was harmless include: the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *Prevo,* 302 Ill. App. 3d at 1048. Here, while Wade's testimony was important to the State's case, the jury heard an abundance of sufficient evidence aside from Wade to convict defendant. Rush, Peters, Gregory, Damery, the officers, and various phone records all introduced the same information that Wade provided. Thus, the State's overall case did not rely solely upon Wade's testimony as it had plenty of corroborating evidence. Further, defense counsel raised the potential bias that Wade had "cut a deal" with the State by pointing out that Wade was not charged with any crime connected to

this murder. Even though defense counsel should have been given more latitude in questioning Wade about the State's potential leniency for the crimes he committed while this case was pending, it was not as if the jury was entirely unaware of his potential bias. Therefore, the trial court's error in limiting cross-examination on this point was harmless.

Defendant failed to argue that this error constituted reversible error. Defendant cites *People v. Perkins,* 292 Ill. App. 3d 624, 630 (1997) in support, which we find distinguishable. In *Perkins,* defense counsel presented evidence that two key witnesses had been sentenced favorably prior to trial *after* the sentencing judge had been informed that the witnesses were cooperating with the State in the defendant's trial. *Perkins,* 292 Ill. App. 3d at 630. While no formal contract or agreement existed between the witnesses and the State, the State stipulated to the facts presented by the defendant. *Perkins,* 292 Ill. App. 3d at 630. There was evidence that the State presented these witnesses knowing that they were providing perjuring testimony that they had no agreement with the State, and the State also did not argue that there was overwhelming evidence against the defendant despite the testimony of the two witnesses. *Perkins,* 292 Ill. App. 3d at 634. Therefore, the court reversed and remanded the cause for a new trial. *Perkins,* 292 Ill. App. 3d at 634.

Here, we have no evidence that a formal agreement was entered into, and no direct evidence that the sentencing judges knew that Wade was cooperating

with the State in defendant's case when they sentenced Wade. Wade was already on parole by the time he testified at trial, so it was not as if he were testifying while awaiting sentencing unlike the witness in *People v. Triplett,* 108 Ill. 2d 463, 478 (1985), which defendant relies upon where the witness was in custody at the time of the defendant's trial. Unlike in *Perkins,* there is nothing conclusive establishing that the State knowingly presented a perjuring witness, and here the State has pointed to the overwhelming corroborating evidence that supported Wade's testimony and defendant's conviction. As such, the trial court's error does not require reversal.

Finally, we find defendant's *Brady* claim that the State failed to disclose that Wade received a reduced sentence in exchange for his cooperation is waived as it was not raised in the trial court or in a posttrial motion. See *People v. Jones,* 241 Ill. App. 3d 228, 234 (1993).

D. Memory Loss and Confrontation Clause

Defendant next claims that his right to confront witnesses was violated when Wade, Gregory, and Rush testified but could not remember various events or prior statements. The State sought admission of the witnesses' prior testimony pursuant to section 115-10.1 of the Code (725 ILCS 5/115-10.1 (West 2006)). Defendant argues that the witnesses were unavailable for cross-examination due to memory loss, and therefore, the statements should not have

been allowed in. Defendant failed to object on this ground at the time of trial or in a posttrial motion, but we review pursuant to the plain error rule. 134 Ill. 2d R. 615. On this issue, we disagree with defendant.

Whether these witnesses were available for cross-examination is a question of law which we review *de novo*. *People v. Rozela,* 345 Ill. App. 3d 217, 223 (2003). All defendants shall enjoy the right to be confronted with the witnesses against them. *Crawford v. Washington,* 541 U.S. 36, 42, 158 L. Ed. 2d 177, 187, 124 S. Ct. 1354, 1359 (2004). The Supreme Court in *Crawford* did not explain what it meant for a witness to "appear" for cross-examination, but it also did not overrule or question earlier decisions that resolved this issue: *Delaware v. Fensterer,* 474 U.S. 15, 88 L. Ed. 2d 15, 106 S. Ct. 292 (1985), and *United States v. Owens,* 484 U.S. 554, 98 L. Ed. 2d 951, 108 S. Ct. 838 (1988). In *Fensterer,* an expert witness could not recall the bases for his opinion that a hair was forcibly removed from the victim. *Fensterer,* 474 U.S. at 17, 88 L. Ed. 2d at 17, 106 S. Ct. at 293. The defendant argued that because of the witness's memory loss, he could not cross-examine the witness. *Fensterer,* 474 U.S. at 17, 88 L. Ed. 2d at 17, 106 S. Ct. at 293. The Supreme Court stated that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Fensterer,* 474 U.S.

at 20, 88 L. Ed. 2d at 19, 106 S. Ct. at 294. The confrontation clause is generally satisfied when the defense is given a "full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Fensterer,* 474 U.S. at 22, 88 L. Ed. 2d at 21, 106 S. Ct. at 295. Thus, the expert's inability to recall the basis for his opinion went to the weight of the evidence, not its admissibility or the State's ability to call the witness. *Fensterer,* 474 U.S. at 22, 88 L. Ed. 2d at 21, 106 S. Ct. at 296.

Similarly, in *Owens,* the government's key witness, the victim in the case, suffered severe head injuries which caused severe memory loss. *Owens,* 484 U.S. at 556, 98 L. Ed. 2d at 956, 108 S. Ct. at 841. Although he identified the defendant as his attacker at trial, he could not recall seeing his attacker at the time, he could not remember any hospital visitor except for the investigator, and he could not remember identifying another person as his attacker. *Owens,* 484 U.S. at 556, 98 L. Ed. 2d at 956, 108 S. Ct. at 841. The Supreme Court agreed with the *Fensterer* court that the witness's memory loss did not mean that the witness was unable to be cross-examined but rather the memory loss went to the weight and not the admissibility of the witness's testimony. *Owens,* 484 U.S. at 560, 98 L. Ed. 2d at 958, 108 S. Ct. at 843.

Illinois courts have similarly held that memory loss does not necessarily make a witness "unavailable" for

cross-examination. In *People v. Flores,* 128 Ill. 2d 66, 88 (1989), the supreme court held that the defendant's right to cross-examine was not violated when a witness could not remember details of a conversation that he had with the defendant. Gaps in the witness's recollection concerning content of a prior statement did not necessarily preclude an opportunity for effective cross-examination. *Flores,* 128 Ill. 2d at 88. Thus, the trial court did not err in admitting the witness's earlier grand jury testimony. *Flores,* 128 Ill. 2d at 89.

In *People v. Redd,* 135 Ill. 2d 252, 300-02 (1990), the State successfully sought admission of the grand jury testimony of a witness that asserted his fifth amendment right to refrain from incriminating himself. The defendant argued that because the witness refused to answer questions, he could not cross-examine the witness. *Redd,* 135 Ill. 2d at 303. The court distinguished the case from *Flores* in that the witness, by asserting his fifth amendment privilege, was not asserting any gaps in his recollection concerning the prior statement but only that his answers may incriminate him, and therefore, the statement should not have been allowed in. *Redd,* 135 Ill. 2d at 308.

In *People v. Martinez,* 348 Ill. App. 3d 521, 532 (2004), the witness could not remember all the details of the crime to the extent she could on the night she was questioned by police. Defense counsel questioned the witness and her ability to recall the circumstances surrounding the statement, thereby attacking its reliability. *Martinez,* 348 Ill. App. 3d at 533. The

court held that where the witness was available in court, on the witness stand, and answering questions posed by counsel, the witness was available for cross-examination and prior inconsistent statements could be admitted under section 115-10.1. *Martinez,* 348 Ill. App. 3d at 535.

In *People v. Bueno,* 358 Ill. App. 3d 143, 151-56 (2005), this court held that the witness was available for cross-examination despite denying that he made a prior statement and his refusal to testify. The witness denied that he made statements to the police regarding a shooting, but then admitted making one written statement. *Bueno,* 358 Ill. App. 3d at 155. He then refused to testify further, but the trial court made him available for cross-examination. *Bueno,* 358 Ill. App. 3d at 155. On cross-examination, the witness answered the questions asked by defense counsel and admitted making portions of the written statement. *Bueno,* 358 Ill. App. 3d at 155. Because he answered defense counsel's questions, the trial court ruled that he was "available" for cross-examination and that the prior inconsistent statement was admissible. *Bueno,* 358 Ill. App. 3d at 154-55. See also, *People v. Sharp,* 355 Ill. App. 3d 786, 795 (2005) (finding witness was available for cross-examination, stating that "the key inquiry is whether she was present for cross-examination and answered questions asked of her by defense counsel" and because the witness did so, the confrontation clause placed no restrictions on the use of her prior statements.)

The facts of this case are unlike those in *Redd* and analogous to those in *Fensterer, Owens, Flores, Bueno, Martinez,* and *Sharp*. The witnesses in this case recalled bits and pieces of their prior statements and for the most part, stated that they did not recall events because of the passage of time. They acknowledged making their statements but failed to recall the details or changed details. These witnesses[1] were present for cross-examination and answered counsel's questions. For each witness, defense counsel properly attacked the witnesses' credibility by illuminating their inability to remember details. While questioning may not have gone the way defense counsel desired, defendant's right to be confronted with witnesses was not violated.

Defendant, after failing to raise this issue at trial, failing to do so in a posttrial motion, and failing to mention or argue that plain error applies, also failed to acknowledge the case law discussed. Instead, defendant cited to *In re Rolandis G.,* 352 Ill. App. 3d 776 (2004), and *People v. Learn,* 371 Ill. App. 3d 701 (2007). Both cases are inapplicable. *Rolandis G.* is distinguishable because in that case, the child witness refused to answer any more questions after the State's initial few questions. *Rolandis G.,* 352 Ill. App. 3d at 783-84. Hence, defense counsel was not afforded an opportunity to question the witness at all. Similarly, in

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[1] Because Pool's testimony was stricken, we decline to address it though defendant mentions Pool in his brief.

Learn, the child witness was able to acknowledge the existence of the defendant, that she did not like him, but was unable to answer any other questions related to the abuse because she was sobbing and afraid. *Learn,* 352 Ill. App. 3d at 707-08. The questioning never delved into the child's statements to police by either the State or defense counsel because it was clear the child could not respond to such questions. *Learn,* 352 Ill. App. 3d at 707-08. Unlike in *Rolandis G.* and *Learn,* the witnesses in this case were adults, answered the State's questions, answered defense counsel's questions, acknowledged that they made prior statements, acknowledged that they could not remember anything they previously said, and explained their memory losses using various excuses (passage of time and/or use of drugs or alcohol). Therefore, the trial court did not err in allowing prior statements into evidence pursuant to section 115-10.1 because the witnesses were available for cross-examination.

E. Admission of Pool's Prior Statements

Defendant argues that his confrontation clause rights were violated when the trial court admitted Pool's previous statements because Pool was unavailable for trial. However, Pool's statements were not admitted; the trial court struck Pool's testimony and the jury was not given transcripts of his prior statement to police. The trial court determined that Pool was unavailable as a witness based on his refusal to answer questions, and it did so in response to defendant's

objection. The trial court, thus, addressed defendant's argument regarding his ability to cross-examine Pool by sustaining the objection, striking Pool's testimony, and instructing the jury to disregard it. The trial court's instruction was sufficient to cure any prejudice that may have resulted from the testimony. *People v. Clark,* 231 Ill. App. 3d 571, 575 (1992).

Defendant argues that the jury obviously "gave credence to his testimony even though it was stricken" because the jury "requested all of the witness's grand jury transcripts and police tapes." We disagree. The jury's written question to the judge asked for Pool's taped police interview and grand jury testimony, the grand jury testimony of Wade and Rush, *and* the recorded police interviews of Rush. The trial court responded to the jury by reminding it that it was not to consider the testimony of Pool, and the jury was not given Pool's testimony or police statement. Moreover, the jury only heard Pool respond to questions regarding basic facts of the case, which they heard through other witnesses' testimony anyway.

F. Closing Arguments

Defendant argues that the State's comments in closing rebuttal arguments violated his fifth amendment rights and require reversal. We disagree.

Prosecutors are afforded wide latitude in closing arguments and may argue facts and reasonable inferences drawn from the evidence. *People v. Williams,* 192

Ill. 2d 548, 573 (2000). In reviewing challenges to prosecutorial remarks during closing arguments, we consider the context of the entire arguments of the parties. *Williams,* 192 Ill. 2d at 573. Even if a prosecutorial comment exceeds the bounds of proper argument, the verdict must not be disturbed unless it can be said that the remark caused substantial prejudice to the defendant. *Williams,* 192 Ill. 2d at 573. Substantial prejudice is reviewed by evaluating whether the outcome would have been different absent the remarks, taking into consideration the content and context of the language used, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial. *Williams,* 192 Ill. 2d at 573. Whether statements made by a prosecutor warrant a new trial is an issue we review *de novo. People v. Wheeler,* 226 Ill. 2d 92, 121 (2007).

Defendant specifically objects to the following comments:

> "He doesn't say, when he gets called, I didn't do this. He doesn't say stop talking like that, I didn't do it, talk to Dodo, talk to Cecil, why are you bothering me with this.
>
> * * *
>
> [Objection to State misstating the evidence in the overhears. Objection sustained.]
>
> * * *
>
> I don't want to be on this phone for longer than two minutes, don't be talking like that over the phone."

Defendant objected to the first two remarks made and the trial court sustained that objection. "The trial court can normally correct any error resulting from an improper remark by sustaining the objection or instructing the jury to disregard the comment." *People v. Foster,* 322 Ill. App. 3d 780, 791 (2000). Further, the jury was properly admonished that closing arguments are not evidence.

As to the second remark, defense counsel did not object at trial and did not raise the argument in a posttrial motion. Therefore, the issue has been waived. Still, if the issue was not waived, the comment was made in the State's rebuttal argument, which was in response to defense counsel's arguments referring to the recorded conversations between defendant and Pool. Defense counsel argued that defendant was heard on those tapes stating "shut up, don't talk" and not to worry because the gun was gone and the jury could infer that meant Pool was the person who was worried and potentially the guilty party. In rebuttal, the State discussed a different inference that could be drawn from the comments, which was that defendant did not want to be on the phone long, did not want to mention the gun, and did not want anyone to talk to the police because he was the one who shot the gun. When defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial. *People v. Evans,* 209 Ill. 2d 194, 225 (2004).

Moreover, defendant's argument that these comments were used improperly as evidence of his

guilt is disingenuous. Defendant cites to *People v. Powell,* 301 Ill. App. 3d 272, 274-76 (1998), for support but that case involved a police officer's testimony that the defendant did not answer whether he had choked his wife. Here, defendant's failure to deny that he shot the cab driver was not made to a police officer or in court, nor was it admitted into evidence as a tacit admission as the prosecutor's remarks were not evidence. Rather, the prosecutor used the tape recordings of defendant speaking to Pool, which were in evidence, to draw reasonable inferences. This is exactly the purpose of closing arguments and in no way violated defendant's fifth amendment right to remain silent.

G. Admissibility of Overhears

Finally, defendant argues that the trial court erred in allowing the overhear conversations between defendant and Pool to be heard by the jury and admitted into evidence when Pool was unavailable for cross-examination. Defendant argues that these tapes were testimonial because they were made under police direction with the purpose of establishing past facts of the crime and was therefore inadmissible under *Crawford.* We review questions of law *de novo* (*People v. Hauschild,* 226 Ill. 2d 63, 72 (2007)), and evidentiary rulings for an abuse of discretion (*Wheeler,* 226 Ill. 2d at 133). We disagree for two reasons that tapes trigger *Crawford.*

First, the tapes are not testimonial. The Illinois Supreme Court fashioned the United States Supreme Court's analysis of testimonial evidence in *Crawford,* 541 U.S. at 68, 158 L. Ed. 2d at 203, 124 S. Ct. at 1374, and *Davis v. Washington,* 547 U.S. 813, 836, 165 L. Ed. 2d 224, 245-46, 126 S. Ct. 2266, 2282 (2006), into a two-component test derived from the definition of "testimony" as "solemn declarations for the purpose of establishing or proving some fact germane to the defendant's prosecution." *People v. Stechly,* 225 Ill. 2d 246, 280-81 (2007). Thus, the two components are that statements (1) must be made in a solemn fashion, and (2) must be intended to establish a particular fact. *Stechly,* 225 Ill. 2d at 281-82. When examining solemnity, the United States Supreme Court was divided: the majority in *Davis* believed solemnity was established by the potential consequences of lying to a police officer whereas the dissent believed it was established if the statements were made in a setting with a higher degree of formality and possibly included *Miranda* warnings. *Stechly,* 225 Ill. 2d at 282. Regardless, when examining the intent of a statement made to the police or an agent of the police, the "focus is on whether * * * the witness was acting in a manner analogous to a witness at trial, describing or giving information regarding events which had previously occurred." *Stechly,* 225 Ill. 2d at 282. When looking at statements made to the police or an agent, the focus must be on the intent of the *questioner* in eliciting the statement and not on the intent of the declarant. *Stechly,* 225 Ill. 2d at 284-85. However, when reviewing statements that

are made outside of the context of police interrogation, the focus is on the *declarant's* intent. *Stechly,* 225 Ill. 2d at 289. The supreme court queried "Would the objective circumstances have led a reasonable person to conclude that their statement could be used against the defendant?" *Stechly,* 225 Ill. 2d at 289.

In this case, there is no evidence of solemnity, or rather that defendant believed that there would be any consequences for his statements. Defendant was certainly not in custody or being interrogated by police or a known agent of the police. While Pool was cooperating with police to create the tape recordings, defendant did not know this. When he was speaking with Pool, defendant, (the declarant) did not believe that Pool was working with police and that his statements were going to be used in his prosecution. Considering the declarant's intent, he was not speaking in order to establish any particular past fact. Therefore, defendant's statements do not constitute testimonial statements. See *United States v. Redmond,* 525 F. 3d 583, 589 (7th Cir. 2008) ("A statement unwittingly made to a confidential informant and recorded by the government is not 'testimonial' for Confrontation Clause purposes.").

Second, the recordings are not hearsay and were admissible as statements by a party opponent. *People v. Aguilar,* 265 Ill. App. 3d 105, 110 (1994) (A statement by an accused may be used against him as an admission and Illinois courts often rely upon Federal Rule of Evidence 801(d)(2) in finding that a defendant's admissions are not excludable hearsay). In

United States v. Tolliver, 454 F. 3d 660, 664-65 (7th Cir. 2006), the Seventh Circuit Court of Appeals determined that audiotape recordings of the defendant and a confidential informant about a cocaine sale were not testimonial because the defendant did not know his statements would or may be used against him. Further, the defendant's taped statements constituted admissions by a party-opponent, not hearsay, and were admissible. *Tolliver,* 454 F. 3d at 665. Likewise, defendant's recorded statements were admissible as non-hearsay admissions by a party.

The *Tolliver* court also found that the informant's statements were admissible because they provided context for the defendant's statements and were not offered for their truth. *Tolliver,* 454 F. 3d at 666. "As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused." *Tolliver,* 454 F. 3d at 666; see also *United States v. Woods,* 301 F. 3d 556, 560-61 (7th Cir. 2002) (similarly holding that recordings between the defendant and an informant were not testimonial because the defendant was unaware that his statements may be used against him and the informant's statements were admitted for context). Pool's statements provided context for defendant's statements. To the extent that his statements may have been admitted for their truth, we find that error to be harmless. "When a defendant challenges the admission of evidence, we may hold the admission to be harmless" where the

evidence in the record establishes the defendant's guilt beyond a reasonable doubt and a retrial without the erroneously admitted evidence would not produce a different result. *People v. McKown,* 226 Ill. 2d 245, 276 (2007). Here, Pool's statements on the tapes are not the incriminating ones. His statements are not accusatory nor do they establish any details that other witnesses had not already established. Furthermore, defendant wholly failed to discuss how or why Pool's statements were prejudicial. For these reasons, the trial court's admission of the recordings of Pool and defendant was not an abuse of discretion and did not trigger or violate the protections afforded in the confrontation clause.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

Affirmed.

BOWMAN, J., with HUTCHINSON and BURKE, JJ., concurring.

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

November 26, 2008

Mr. John F. Donahue
Donahue, Sowa & Magana
3030 Warrenville Road, Suite 215
Lisle, IL 60532

No. 107248 – People State of Illinois, respondent, v. Charles M. Hill, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 31, 2008.